
SECRETARY OF LABOR,
Complainant,
v.
JTM INDUSTRIES, INC.,
Respondent.

OSHRC Docket No. 98-0030

DECISION

Before: ROGERS, Chairman; EISENBREY, Commissioner.

BY THE COMMISSION:

JTM Industries, Inc. (“JTM”) was under contract to perform reclamation work at the East 40 Mine (“E-40 mine”) at Reynolds Metals Company’s Hurricane Creek Mine Project in Bauxite, Arkansas. The E-40 mine is an open-pit mine from which Reynolds extracted bauxite, a claylike ore from which aluminum is obtained. Following an inspection by the Occupational Safety and Health Administration (“OSHA”) on July 18, 1997, the Secretary of Labor (“the Secretary”) issued JTM one citation with two items, alleging serious violations of personal protective equipment and training standards. Administrative Law Judge Nancy J. Spies affirmed both items and assessed a total penalty of \$1200. At issue on review is whether the Mine Safety and Health Administration (“MSHA”) has authority over the cited conditions so that OSHA’s authority is preempted by section 4(b)(1) of the Occupational Safety and Health Act of 1970 (“OSH Act”), 29 U.S.C. § 653(b)(1).¹

¹Section 4(b)(1) provides:

Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

I. Background

Reynolds Metals Company (“Reynolds”) at one time operated a number of open-pit bauxite mines at its Hurricane Creek Mine Project. At issue here is the E-40 mine, which covers 332 acres and is approximately 140 feet deep, 2000 feet long, and 1400 feet wide. Reynolds last extracted bauxite from the E-40 mine in February 1983. On June 9, 1994, Reynolds contracted with JTM to perform reclamation work at the mine. On August 12 of that year, JTM subcontracted with Oxford Mining, Inc. (“Oxford”)² to help fill the E-40 mine and improve or construct haul roads connecting the mine to other parts of the Hurricane Creek Mine Project. During the bauxite extraction process, Reynolds had removed soil and rocks from the E-40 mine and taken this “spoil” to an area of the plant known as “Four Lakes.” Part of the reclamation project involved returning spoil from Four Lakes to the mine.

While working at the E-40 mine, both JTM and Oxford employees handled a material called “Alroc.” Alroc is a trademarked name used by Reynolds to describe incinerator ash from pot liners that had been used in the primary aluminum reduction process. Reynolds had treated the Alroc at its Gum Springs waste treatment facility, located approximately sixty-five miles south of the E-40 mine. Rather than disposing of this material in the Gum Springs landfill, Reynolds sought to find a commercial use for Alroc, which is highly alkaline. In April 1996, JTM and Oxford began placing Alroc in the E-40 mine to balance the acidity of the mine spoil leachate. JTM and Oxford also used Alroc to surface haul roads in and around the E-40 mine.

Because of concerns about the environmental impact of Alroc, and pursuant to an agreement between Reynolds and the Arkansas Department of Pollution Control and Ecology, JTM and Oxford began removing Alroc from the haul roads in June 1997. John Reeder, JTM’s project manager over reclamation activities at the E-40 mine, testified that

²Oxford was also cited by OSHA and our disposition of that case, *Oxford Mining, Inc.*, OSHRC Docket No. 98-0057, also issued today.

by the time of the OSHA inspection the only portion of the haul roads that still contained Alroc was the “southern third” of the haul road leading from the Four Lakes spoil piles to the E-40 mine. According to Reeder, this was the part of the road “down in the pits that was still below grade or final grade.”

The two citation items at issue allege that Alroc can cause health problems, including skin and eye irritation, and that JTM violated personal protective equipment and hazard communication training standards by failing to protect employees from Alroc exposure.

II. Preemption

The Commission evaluates an employer’s argument that OSHA’s authority is preempted under section 4(b)(1) by considering (1) whether the other federal agency has the statutory authority to regulate the cited working conditions, and (2) if the agency has that authority, whether the agency has exercised it over the cited conditions by issuing regulations having the force and effect of law. *E.g.*, *MEI Holdings, Inc.*, 18 BNA OSHC 2025, 2025, 1999 CCH OSHD ¶ 32,011, p. 47,759 (No. 96-740, 2000), *aff’d without published opinion*, 247 F.3d 247 (11th Cir. 2001) (Department of Defense); *Rockwell International Corp.*, 17 BNA OSHC 1801, 1803, 1995-97 CCH OSHD ¶ 31,150, p. 43,531 (No. 93-45, 1996) (consolidated) (National Aeronautics and Space Administration).³ The Commission gives considerable weight to a federal agency’s representation as to its authority to regulate cited working conditions. However, the Commission independently reviews the statutory and regulatory provisions at issue, as well as the evidence, to determine whether that view is reasonably supported by the record. *MEI Holdings, Inc.*, 18 BNA OSHC at 2026, 1999 CCH

³The typical preemption case involves two unrelated agencies. Although both OSHA and MSHA are agencies in the Department of Labor, we will nevertheless apply the same analysis we would apply if the agencies were unrelated. In response to an invitation for a separate brief on MSHA’s behalf, the Solicitor of Labor indicated that the Secretary of Labor’s position on the respective authorities of MSHA and OSHA would be discussed in her brief on review.

OSHD at p. 47,759; *Rockwell International Corp.*, 17 BNA OSHC at 1803, 1995-97 CCH OSHD at pp. 43,531-32. In this case, only the first part of the test whether MSHA has statutory authority over the cited conditions is at issue. In her brief on review, the Secretary acknowledges that MSHA has promulgated regulations that address the health hazards at issue in the present case,⁴ and that OSHA's authority to regulate the cited hazards would be preempted if MSHA has statutory authority over the hazards.

The citation alleges that the violations occurred "in and around the E-40 Mine Reclamation Area." MSHA's statutory authority to regulate the working conditions in that area depends on whether the area is a "coal or other mine" within the meaning of section 4 of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 803. Section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1), defines "coal or other mine," in relevant part, as:

(A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

On the facts of this case we conclude that the E-40 site constitutes a "mine" under section 3(h)(1)(C) of the Mine Act, and that OSHA's authority over it is, therefore, preempted. In light of the statutory language of the Mine Act and its legislative history, we construe the area in and around the E-40 pit as an "excavation," "facilities," and "other

⁴See generally 30 C.F.R. § 56.

property” “resulting from[] the work of extracting . . . minerals.”⁵ The E-40 pit was excavated for the purpose of mining bauxite, and the surrounding land was developed during the bauxite extraction process as haul roads were constructed and the Four Lakes spoil pile was formed.

With respect to the haul road on which the cited condition was located, we note first that the portion of the road at issue during the inspection was inside the excavated bauxite pit. To the extent, however, that the citation also pertains to other areas of the haul road, we disagree with the judge’s narrow reading of section 3(h)(1)(C) in finding that the network of roads in and around the E-40 mine was not part of the “mine” under that section. In making this finding, the judge relied on *Bush & Burchett, Inc. v. Reich*, 117 F.3d 932, 939 (6th Cir.), *cert. denied*, 522 U.S. 807 (1997), in which the Sixth Circuit rejected the employer’s contention that a road was an integral part of a mine and its loadout facility under section 3(h)(1)(C). The court noted that “it is not clear from the statute or legislative history that Congress intended to include roads within the meaning of [section 3(h)(1)(C)], since Congress specifically dealt with roads in [section 3(h)(1)(B)].” *Id.* at 939.

In our view, this final comment by the court, which was not the subject of any further analysis, does not reflect the main holding of *Bush & Burchett*. The key issue before the court in that case was whether a road connecting a coal mine to a loadout facility was a “mine” under section 3(h)(1)(B).⁶ Holding that the worksite was a public rather than private road,

⁵In a similar context, MSHA jurisdiction was upheld over an electric generation station that burned material taken from a coal mine culm bank located on its property. Although the mine had ceased operation forty years earlier, the Federal Mine Safety and Health Review Commission (“FMSHRC”), the agency charged with adjudicating disputes under the Mine Act, found that “the culm bank literally falls within the statutory definition of ‘mine’ [under section 3(h)(1)(C)] since ‘it results[s] from the work of extracting . . . minerals from their natural deposits’ ” *Westwood Energy Properties*, 11 FMSHRC 2408, 2413, 1987-90 CCH OSHD ¶ 28,777, p. 38,361 (Nos. PENN 88-42-R; 88-43-R; 88-73-R through 88-89-R; and 88-148, 1989) (citation omitted).

⁶Section 3(h)(1)(B) applies by its terms specifically to “private ways and roads.”

the Sixth Circuit expressed concern that if a public road can be considered a “mine” MSHA jurisdiction “could conceivably extend to unfathomable lengths[.]” *Id.* at 937. Therefore, the court did not foreclose a conclusion that MSHA has jurisdiction over the private roads that are completely within the Hurricane Creek Mine Project, and partly within the E-40 pit itself.

We conclude, unlike the judge, that the road at issue here is part of a “mine” under section 3(h)(1)(C). In our view, this interpretation of the relevant statutory provisions is compelled by the legislative history of the Mine Act, which explicitly contemplates “a need to resolve jurisdictional conflicts” and emphatically states “that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and . . . that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.” S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977). *See Herman v. Associated Elec. Co-op, Inc.*, 172 F.3d 1078, 1081 (8th Cir. 1999) (Congress intended “mine” to be given broadest possible interpretation, noting remedial nature of Mine Act); *Bush & Burchett*, 117 F.3d at 936-37 (same); *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1554 (D.C. Cir. 1984) (upholding MSHA jurisdiction over mineral processing facility not engaged in extraction); *Harmon Mining Corp. v. FMSHRC*, 671 F.2d 794, 796-97 (4th Cir. 1981) (“broad definition of a ‘mine’ in the Act demonstrates that Congress intended that term to encompass all of the facilities used at a coal preparation plant”).

The Secretary argues, however, that neither the haul roads nor the E-40 pit itself can be considered a “mine” under section 3(h)(1)(C) because the reclamation work did not begin until eleven years after the mine closed and MSHA stopped inspecting it, and because the reclamation work was unrelated to ongoing mineral extraction. In support of her argument, the Secretary contends, “It is simply inconceivable that Congress intended that MSHA would regulate in perpetuity all occupational activities on parcels of land resulting from, or affected by, mineral extraction activities merely because mineral extraction activities had taken place some time in the past.” Of course, relevant court and administrative precedent makes clear that there *are* limits to the scope of MSHA jurisdiction. The determination of whether a cited

facility is a “mine,” however, must be based on factors derived from the statutory definition. We find no indication in the statute or its legislative history that a facility that meets the statutory “resulting from” criterion would be denied Mine Act coverage solely because too much time had passed since mineral extraction had ceased. Neither has the Secretary cited any authority indicating that duration of abandonment is a factor in determining whether a facility is a mine under the Mine Act. Nor has she offered any reason to distinguish between an eleven-year and a one-day hiatus between the cessation of active mining and commencement of reclamation activities for purposes of determining whether a facility is a mine. There is nothing illogical or contrary to Congressional intent in extending Mine Act coverage to include the reclamation of lands resulting from mineral extraction, particularly, in our view, under the circumstances of this case.

In addition, the Secretary has not cited any decisions that support her argument that there must be a nexus between the cited activity and active mineral extraction. In fact, the Third Circuit, in *Marshall v. Stoudt’s Ferry Preparation Co.*, 602 F.2d 589, 592 (3rd Cir. 1979), explicitly rejected the argument, made in that case by the employer, that a business cannot be “included within the Act’s ambit because [its] activities are not related to the extraction of minerals from natural deposits or their preparation after extraction.” Also, in *Lancashire Coal Co. v. Secretary of Labor*, 968 F.2d 388 (3rd Cir. 1992), the Third Circuit strongly indicated that it would have considered the demolition of a silo at an abandoned coal mine to be work at a “mine” as defined in section 3(h)(1)(C) if “resulting from” language had been included in that part of section 3(h)(1)(C) addressing coal preparation facilities. The Court stated, “If Congress does in fact intend [for MSHA] to cover the activity of reclamation of structures that were once used in preparation of coal, but are no longer being so used . . . it can amend section 3(h)(1) to add the two missing words.” *Id.* at 393.

Indeed, the Secretary has taken positions in other cases that are inconsistent with her claim that MSHA does not have jurisdiction over a worksite unless the work performed at

the site has a close relationship to active mineral extraction.⁷ *Lancashire*, cited above, is one example. The Secretary also asserted MSHA jurisdiction in *R.C. Enterprises*, 1995 WL 20256 (Nos. SE 94-251, SE 94-252 & SE 94-438, 1995) (ALJ) and *International Anthracite Corp.*, 14 FMSHRC 1790, 1992 FMSHRC LEXIS 436 (No. PENN 92-230, 1992) (ALJ), two cases involving reclamation work at mines where there was no active extraction. *See also Premier Elkhorn Coal Co.*, 23 FMSHRC 304, 2001FMSHRC LEXIS 39 (No. KENT 2000-188, 2001) (ALJ) (MSHA assertion of jurisdiction over road appurtenant to abandoned coal pit that had undergone reclamation work, with no apparent active mining operations also appurtenant to such road); *James Fork Mining Co.*, 19 FMSHRC 746, 1997 FMSHRC LEXIS 3102 (No. CENT 97-16, 1997) (ALJ) (MSHA assertion of jurisdiction over reclamation work at sealed coal mine not operated in nineteen years where owner filed various documents required to resume mining, but where such mining was only a mere possibility).

We find no merit in the Secretary's additional argument that, if MSHA has jurisdiction over reclamation sites where there is no active mineral extraction, there should be more decisions by the Federal Mine Safety and Health Review Commission ("FMSHRC") affirming citations at such sites. First, we note that there are no FMSHRC decisions finding that MSHA does *not* have jurisdiction over reclamation sites where there is no active extraction. More importantly, however, we note that the number of FMSHRC decisions addressing reclamation work might reflect that MSHA has not actively enforced its regulations which apply to such work. Doyle Fink, district manager for the MSHA region that includes Arkansas, acknowledged at his post-hearing deposition that personnel limitations have been a factor in MSHA's jurisdictional determinations. A lack of

⁷*See, e.g., Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993) ("the consistency of an agency's position is a factor in assessing the weight that position is due").

enforcement, of course, does not mean that MSHA does not have the *authority* to enforce its regulations. MSHA's authority, not the vigor of its enforcement, is the subject of our inquiry under section 4(b)(1) of the OSH Act. *Daniel Construction Co.*, 12 BNA OSHC 1748, 1751, 1986 CCH OSHD ¶ 27,538, p. 35,734 (No. 82-668, 1986); *Pennsuco Cement and Aggregates, Inc.*, 8 BNA OSHC 1378, 1381, 1980 CCH OSHD ¶ 24,478, p. 29,890 (No. 15462, 1980).

We also note that some of the working conditions involved in reclaiming the E-40 site are similar to those employees faced during the bauxite extraction process. *Cf. Bituminous Coal Operators Assn. v. Secretary of Interior*, 547 F.2d 240, 245 (4th Cir. 1977) (finding the Coal Act applicable to coal mine construction company, court noted that construction workers were subject to the same hazards as miners). The E-40 mine was 140 feet deep when reclamation began, and employees were exposed to vertical walls of overburden. Employees at the E-40 mine used equipment similar to that used during certain phases of the bauxite extraction process including scrapers, bulldozers, backhoes, and haul trucks to refill the previously-excavated pit with its own spoil. In fact, an MSHA official provided training to employees involved in the reclamation work. This training addressed equipment use and the hazards of water accumulation in the E-40 mine. The participation of an MSHA official in employee training does not, in itself, establish that MSHA has jurisdiction over the E-40 mine, but it does indicate that some of the working conditions during reclamation were similar to those during extraction.

For all the reasons above, we find that the E-40 reclamation site is a "mine" within the scope of MSHA's regulatory authority. Because we find that MSHA has statutory authority to regulate the working conditions in and around the E-40 mine reclamation area,

and has exercised its authority by issuing regulations that apply to the cited conditions, we conclude that OSHA's authority is preempted by section 4(b)(1) of the OSH Act. Accordingly, we vacate the citation.

/s/
Thomasina V. Rogers
Chairman

/s/
Ross Eisenbrey
Commissioner

Date: December 14, 2001

Secretary of Labor,
Complainant,

v.

OSHRC Docket No. **98-0030**

JTM Industries, Inc.,
Respondent.

Appearances:

Madeleine T. Le, Esquire
David C. Rivela, Esquire
U. S. Department of Labor
Office of the Solicitor
Dallas, Texas
For Complainant

Carl B. Carruth, Esquire
McNair Law Firm, P.A.
Columbia, South Carolina
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

JTM Industries, Inc. (JTM), contests a citation issued to it by the Secretary on November 14, 1997. The Secretary issued the citation as a result of an inspection conducted by the Occupational Safety and Health Administration (OSHA) at the Hurricane Creek Mine Project in Bauxite, Arkansas, in July 1997.

Item 1 of the citation alleges a serious violation of § 1910.1200(h)(3)(iii), for failure to train employees in measures they can take to protect themselves from exposure to hazardous chemicals. Item 2 of the citation alleges a serious violation of § 1910.132(a), for failure to provide appropriate personal protective equipment to its employees.

Also on November 14, 1997, the Secretary issued a citation alleging violations of the same standards to Oxford Mining Company, Inc., with whom JTM had subcontracted on the Hurricane Creek Mine Project. Both JTM and Oxford contested the citations, and the cases were consolidated by order of the undersigned on May 27, 1998, for purposes of hearing.⁸

⁸ To avoid confusion, the cases were severed for purposes of decision.

JTM disputes OSHA's jurisdiction over the worksite, asserting an affirmative defense under § 4(b)(1) of the Occupational Safety and Health Act of 1970 (Act). For the reasons set out below, JTM's affirmative defense is rejected, and items 1 and 2 of the citation are affirmed.

Background

At one time Reynolds Metals Company operated numerous open pit bauxite mines at its Hurricane Creek Mine Project in Bauxite, Arkansas (Tr. 603). The bauxite ore excavated from the mines was used in the production of aluminum. The specific worksite at issue in this case is designated as the E-40 site. The E-40 site is a 330-acre site that includes an abandoned bauxite mine pit and the areas adjacent to the pit (Tr. 335).

To remove the bauxite ore, Reynolds stripped away the overburden of soil and rocks that covered the natural deposit of bauxite. Reynolds removed the overburden (called "spoil") from the mine pit and piled it up in spoil piles at an area north of the E-40 mine known as Four Lakes. Reynolds then blasted over the bauxite ore that had been uncovered and removed it from the mine pit by a dragline, loaded it onto trucks, and hauled it to Reynolds's processing plant in Euclid, Arkansas. Reynolds extracted the last bauxite from the E-40 pit in February 1983 (Exh. C-5, Tr. 600).

On June 6, 1994, Reynolds contracted with JTM to perform reclamation services at the E-40 mine pit. On August 12, 1994, JTM subcontracted with Oxford to fill the E-40 pit and to construct haul roads to the E-40 site. In August 1994, Oxford began performing reclamation services (Exh. R-8).

In addition to the Hurricane Creek Mine Project, Reynolds also operated a waste treatment facility near Arkadelphia, Arkansas, known as the Gum Springs Facility. At the Gum Springs Facility, Reynolds treated spent pot liners used in the primary aluminum reduction process. Reynolds gave the spent pot liner the trade name "Alroc."⁹ Reynolds wanted to find a commercial use for Alroc, which was being disposed of in a landfill at the Gum Springs Facility. Reynolds had a number of haul roads on which haul trucks traveled between the Four Lakes spoil piles and the E-40 site. In June and July 1995, Reynolds first used Alroc to surface a test road (Exh. C-5; Tr. 348).

⁹ It is also known as "kiln residue" and was referred to by some witnesses at the hearing as "ash."

In April 1996 Reynolds began placing Alroc from Gum Springs in the E-40 mine pit in thin layers between thicker layers of mine spoil to reduce the acidity of the mine spoil leachate from the pit. The Alroc was alkaline and would help to neutralize the acidity of the leachate from the mine spoil. The Alroc was also used on the haul roads to keep the haul trucks from getting stuck and to use a fill material for the pit to help neutralize the mine spoil (Exh. C-5; Tr. 347).

From 1994 to 1997, approximately 151,770 cubic yards of Alroc were shipped from the Gum Springs Facility to the E-40 site. While working at the Hurricane Creek Mine Project, employees of both JTM and Oxford regularly handled Alroc. The number of onsite employees at the site varied from 50 to 100. Reynolds employed three of these employees. JTM employed five (Tr. 617). The rest of the employees worked for Oxford (Exh. C-5).

In January 1997, leachate water concentrations from the Gum Springs landfill indicated elevated levels of arsenic, fluoride, cyanide, and pH. The Environmental Protection Agency (EPA) conducted interstitial ground water sampling from bore holes at Gum Springs and Hurricane Creek. After the sampling, Reynolds and the Arkansas Department of Pollution Control and Ecology reached a consent agreement on June 30, 1997, to restrict the use and disposal of Alroc. The agreement became effective on August 23, 1997 (Exh. C-5).

Oxford began removing Alroc from the haul roads in June 1997. OSHA began its inspection of the E-40 site on July 18, 1997.

Preemption Under § 4(b)(1) of the Act

JTM argues that the E-40 site is exempt from the requirements of the Occupational Safety and Health Act because, under § 4(b)(1) of the Act, the Mine Safety and Health Administration (MSHA) preempts OSHA's jurisdiction. This is an affirmative defense and JTM has the burden of proving that such preemption occurred.

Section 4(b)(1) of the Act provides:

Nothing in this Act shall apply to working conditions of employees with respect to which other Federal Agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.

In order to establish an affirmative defense under § 4(b)(1), the employer must show that an agency other than OSHA has the statutory authority to regulate the health and safety of workers and

that the other agency exercises its statutory authority in such a manner as to exempt the cited working conditions. *Northwest Airlines, Inc.*, 8 BNA OSHC 1982 (No. 13647, 1980).

The OSH Act authorizes the Secretary of Labor to set mandatory occupational safety and health standards for businesses affecting interstate commerce. *See* 29 U.S.C. § 653(b)(1). The Act, however, exempts from the statute's reach employees who are regulated by other federal agencies. 29 U.S.C. § 653(b)(1). A two-step analysis is used to determine whether OSHA jurisdiction has been preempted: (1) whether a regulation has been promulgated by a state or federal agency other than OSHA; and (2) whether the regulation promulgated covers the specific "working conditions" at issue.

Bush & Burchett, Inc., 117 F. 3d 932, 936 (6th Cir. 1997) (footnote and citation omitted).

The Mine Safety and Health Act (MSH Act) itself provides little clear-cut guidance on the jurisdictional issue in this case. The MSH Act does not specifically address reclamation work or work with hazardous waste. It is ambiguous as to the duration of MSHA's jurisdiction over abandoned mine sites.

The Secretary attempted to bolster its position that OSHA has jurisdiction over the E-40 site by proffering the deposition testimony of Doyle Fink, district manager for MSHA.¹⁰ Fink stated that, in his opinion, MSHA did not have jurisdiction over the E-40 site. His testimony failed to establish a legal basis for determining jurisdiction.

Fink is employed as district manager in MSHA's Dallas, Texas, office and he supervises MSHA inspectors in six states, including Arkansas (Fink deposition, p. 5). Fink referred to the Memorandum of Understanding between MSHA and OSHA¹¹. The Memorandum addresses each agency's jurisdiction with regard to milling and preparation processes, which are not at issue here. Fink admitted that the Memorandum of Understanding does not mention reclamation work. He stated that the Memorandum uses the MSH Act's definition of "coal or other mine," so that it provides no clarification beyond the MSH Act's definition (Fink deposition, pp. 13-14). Fink

¹⁰ The deposition of Doyle Fink was taken by the Secretary on December 29, 1998, to supplement the record in this case. Fink's deposition testimony will be cited as "Fink deposition, p. --." A copy of Fink's deposition is entered into the record as Exhibit J-59 in the case file.

¹¹ "The interagency agreement was originally reported in 39 Fed. Reg. 27,382 (1974). . ." *Donovan v. Carolina Stalite Co.*, 734 F. 2d 1547, 1550, footnote 4 (D.C. Cir. 1984).

admitted that his opinion that MSHA did not have jurisdiction over the E-40 pit was an accommodation to MSHA's personnel shortages (Fink deposition, p. 25). The Secretary failed to adduce any evidence that Fink had the authority to determine which agency had jurisdiction over the E-40 site.

Determination of who had proper jurisdiction over the E-40 site must be decided based on the MSH Act's definition of a mine. If the E-40 site is a mine, then MSHA promulgated regulations that covered the site and MSHA has jurisdiction. If the E-40 site does not qualify as a mine, then MSHA did not promulgate regulations that covered the site and OSHA has jurisdiction. As the discussion below will show, MSHA's definition of what constitutes a "mine" has been the subject of considerable litigation.

Section 3(h)(1) of the MSH Act defines "coal or other mine" as:

(A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this chapter, the Secretary shall give due consideration to the convenience of administration resulting from the delegation of one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

Courts addressing the issue of MSHA jurisdiction have recognized § 3(h)(1)'s "sweeping definition" of a mine in accordance with the MSH Act's legislative history. "[I]t does not matter if what is included in the definition fails to conform to the conventional concept of mining." *Cyprus Industrial Minerals Co. v. MSHA*, 664 F.2d 1116, 1118 (9th Cir. 1981). In *Donovan v. Carolina Stalite Co.*, 734 F. 2d 1547, 1554 (D.C. Cir. 1984), the D. C. Circuit Court of Appeals quotes the Senate Report, which has been influential in the interpretation of the jurisdictional application of the MSH Act:

The Senate Report also said: "The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given *the broadest*

possibl[e] interpretation” [S.Rep. No. 181, 95th Cong., 1st Sess. 14 (1997), U.S. Code Cong. & Admin. News 1977, 34013414] (emphasis added). Close jurisdictional questions are to “be resolved in favor of inclusion of a facility within the coverage of the Act.” *Id.*

See also, Marshall v. Stoudt’s Ferry Preparation Co., 602 F.2d 589 (3d Cir. 1979), and *Harman Mining Corp. v. Federal Mine Safety and Health Review Commission*, 671 F.2d 794 (4th Cir. 1981).

MSHA’s broad jurisdiction remains in place even if MSHA has reduced or suspended its enforcement activities. In *Daniel Construction Co.*, 12 BNA OSHC 1748, 1751 (No. 82-668, 1986), the Review Commission affirmed the administrative law judge’s finding that MSHA preempted OSHA’s jurisdiction under § 4(b)(1), despite evidence that MSHA had no resources to enforce its standards in that case. “The exemption . . . was applied even though at the time of the inspection the other agency was not enforcing its regulations.”

As noted above, Fink testified that MSHA did not want jurisdiction over the E-40 site because MSHA has limited resources and personnel shortages (Fink deposition, p. 25). The case law holds that these considerations are irrelevant in a judicial determination of jurisdiction. “Any oversight of the adequacy of another agency’s enforcement activities is beyond the scope of a permissible inquiry under section 4(b)(1).” *Pennsuco Cement and Aggregates, Inc.*, 8 BNA OSHC 1378, 1381 (No. 15462, 1980).

The Secretary cites two cases in support of its position that MSHA’s broad coverage does not extend to the E-40 site. In *Lancashire Coal Co. v. MSHA*, 968 F.2d 388 (3rd Cir. 1992), the issue was whether a coal silo that collapsed during reclamation work done at an abandoned coal preparation plant came under the jurisdiction of MSHA. The collapse occurred in 1989. The coal silo had not been used since 1971. The administrative law judge ruled that the silo was within the jurisdiction of MSHA. The Federal Mine and Safety Review Commission upheld the judge’s decision. The Third Circuit Court of Appeals set aside the Review Commission’s decision, finding that MSHA did not have statutory jurisdiction under the MSH Act over the abandoned coal silo at the time it issued the citations.

The court noted that the MSH Act “refers to three different mining activities: ‘extracting’ minerals; ‘milling’ minerals; and ‘preparing coal or other minerals.’” *Id.* at 390. Section 3(h)(1)(C) includes within the definition of “mine” structures “used in, or to be used in, or resulting from” the

work of extracting coal; that is, the past, present, and future tenses are covered. However, only structures “used in, or to be used in” the milling of or preparing coal are included in the definition of a “mine.” The statute does not include the words “resulting from” before the words “the work of preparing coal.”

The court noted that the language of the statute led to an anomalous result, and turned to the legislative history of the MSH Act for aid in determining the meaning of section 3(h)(1):

In analyzing the legislative history, it is important to note that there was both a Senate and a House version of the bill that became the Federal Mine Safety and Health Act, and that these versions defined “mine” slightly differently.

Id. at 391.

The court concluded the legislative history:

does not explain Congress’s use of distinct bases for those definitions. The Secretary attempts to explain the distinction by contending that the words “resulting from” were inadvertently omitted from section 3(h)(1) in connection with coal preparation structures. . .

We agree that inadvertent omission may be a plausible explanation for the distinction between sections 3(h)(1) and 3(h)(2). But the legislative history is simply not clear enough to demonstrate that Congress intended the words in section 3(h)(1) to be construed as covering the abandoned silo at issue in this case.

Id. at 392.

The court’s analysis demonstrates that *Lancashire* does not provide unqualified support for the Secretary’s position in the present case. The activity at issue in *Lancashire* is “the work of preparing coal,” whose structures the court determined were not covered by the phrase “resulting from.” Coal preparation is not at issue here.

JTM argues that *Lancashire* actually supports its position because the court follows § 3(h)(1)(C) and finds MSHA jurisdiction over “lands, excavations, [etc.] . . .used in, or to be used in, or resulting from the work of extracting . . .minerals.” JTM argues that, since at one time Reynolds extracted bauxite from the E-40 site, the E-40 site as a whole resulted from the work of extracting minerals and thus is under MSHA’s jurisdiction. JTM’s reliance on *Lancashire* is also

misplaced. Lancashire deals with a structure (a coal silo), covered under § 3(h)(1)(C). At issue here are haul roads, which are not covered under section (C) of the statute.¹²

The Secretary cites *Bush & Burchett, Inc. v. Reich*, 117 F. 3d 932 (6th Cir. 1997), in support of its position because in that case the Sixth Circuit Court of Appeals limited MSHA's jurisdiction, under § 3(h)(1)(B), over "private ways and roads appurtenant to [an area of land from which minerals are extracted]."

In *Bush & Burchett*, the owner of a coal mine contracted with the respondent to build a bridge to connect the mine to a railroad loadout facility, located on the opposite side of a river. The contract between the owner and the respondent provided that, upon completion, the bridge and connecting haul road would be conveyed to the state of West Virginia to become part of the state highway system.

During the construction of the bridge, two of respondent's employees were killed when a boom crane collapsed on top of a pier where they were standing. The day following the fatalities OSHA sent a compliance officer to the site to investigate, after the OSHA area office had conferred with the MSHA area office, and both had determined that MSHA did not have jurisdiction at the accident site. BBI argued that MSHA's jurisdiction preempted OSHA's jurisdiction. The Occupational Safety and Health Review Commission affirmed the citations. The Sixth Circuit affirmed the decision of the Review Commission.

BBI argued that the bridge work came under the definition of a "mine" by virtue of § 3(h)(1)(B), because the public road being constructed was "appurtenant to" a coal mine. In rejecting this argument, the Sixth Circuit emphasized that the road connecting the bridge to the mine was public, thus it did not come under the § 3(h)(1)(B) "private ways" specification.

Although BBI's position is not wholly without merit, since the Act is to be given a very broad reading, we cannot accept BBI's reading of § 802(h)(1)(B). Not only does the statute not compel such a reading, but also such a reading is contrary to common sense. Without some limitation on the meaning of "roads appurtenant to," MSHA jurisdiction could conceivably extend to unfathomable lengths since any road appurtenant to a mine that connects to the outside world would necessarily run into

¹² The citation identifies the location where the exposure occurred as "in and around the E-40 pit." The hearing focused on the employees' exposure to Alroc while they were working on the haul roads. The haul roads are what will be considered by the undersigned in determining the jurisdictional issue.

yet other roads, thus becoming one contiguous road. Because of the potential reach of MSHA jurisdiction if the definition in § 802(h)(1)(B) is left unfettered, “private ways and roads” cannot simply mean “any road.” Otherwise, there could conceivably be no limit to MSHA jurisdiction, a result Congress clearly did not intend.

Id. at 937.

The present case is distinguishable from this aspect of *Bush*. The haul roads constructed by JTM and Oxford were private ways, and there is no danger that finding they are “appurtenant to” the E-40 pit could extend MSHA’s jurisdiction to “unfathomable lengths.” The haul roads constructed by JTM and Oxford ran between the E-40 pit and the spoil piles at Four Lakes (Exh. R-9). The haul roads surfaced with Alroc were all used in connection with the reclamation of the E-40 mine pit (Tr. 349).

While *Bush* supports JTM’s position in this regard, it fails to support it in another crucial aspect. The problem of the use of voice tenses surfaces in *Bush*, as it did in *Lancashire*. Read together, § 3(h)(1)(A) and (B) state that a “mine” is “an area of land from which minerals *are* extracted . . . [and] private ways and roads appurtenant to such area[.]” The definition is in the present tense. In order to be considered a mine, the area of land in question must currently be undergoing extraction of minerals. Bauxite was last extracted from the E-40 site in 1983.

JTM argues that the three tenses used in § 3(h)(1)(C) apply to the haul roads, so that they are “resulting from the work of extracting” minerals. BBI made the same argument in *Bush*, claiming that the bridge was a structure resulting from the work of extracting minerals. The Sixth Circuit rejected this argument, stating “[I]t is not clear from the statute or legislative history that Congress intended to include roads within the meaning of 30 U.S.C. § 802(h)(1)(C), since Congress specifically dealt with roads in § 802(h)(1)(B).” *Id.* at 939.

The Sixth Circuit’s analysis is reasonable. As noted in *Lancashire* and other decisions, the MSH Act’s definition section is not a model of clarity. The use of the different tenses in different sections of the statute can lead (and have led) to confusion. The most straightforward reading of the statute, however, appears to be that the use of the qualifying phrase “used in, or to be used in, or resulting from, the work of extracting” minerals applies only to those items listed in (C), and not to

(A) and (B).¹³ The haul roads were constructed years after the last bauxite extraction had occurred. They were constructed for two reasons: to provide access to the reclamation project and to test whether Alroc was suitable as roadbed material.

Based upon this reasoning, the undersigned concludes that the haul roads were not under MSHA's jurisdiction at the time of the OSHA inspection. Bauxite was no longer being extracted from the E-40 site. Thus, the haul roads did not constitute a "mine" within the meaning of § 3(h)(1) of the MSH Act.

OSHA's jurisdiction was not preempted under § 4(b)(1) by MSHA. OSHA properly had jurisdiction over the E-40 site at the time of the OSHA inspection.

THE CITATION

The Secretary has the burden of proving her case by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1: Alleged Serious Violation of § 1910.1200(h)(3)(iii)

The Secretary alleges that JTM committed a serious violation of § 1910.1200(h)(3)(iii), which provides:

Employee training shall include at least:

...

(iii) The measures employees can take to protect themselves from [the physical and health hazards of the chemicals in the work area], including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used[.]

The Secretary alleges the following violative conduct for this item in the citation:

¹³ JTM attempts to insert its reclamation work under (C) by arguing that the haul roads were constructed on *lands* (one of the items listed in (C)) resulting from the extraction of the mineral bauxite. JTM's argument reads (B) out of the statute. The argument is rejected.

For employees engaged in job operations in and around the E-40 Mine Reclamation Area, the employer did not conduct hazard communication training which included measures employees could take to protect themselves from chemical hazards associated with exposure to road bed materials and Alroc (treated pot liner). Bulk analysis of these materials indicated a pH of 11.5.

Applicability of the Standard

JTM argues that § 1910.1200(h)(3)(iii) does not apply to the cited conditions because the Secretary failed to prove that Alroc is a hazardous substance.

Section 1910.1200(c) defines “hazardous chemical” as “any chemical which is a physical hazard or a health hazard.” Its definition of “health hazard” includes “chemicals which are . . . irritants. . . and agents which damage the lungs, skin, eyes, or mucous membranes.”

The material safety data sheet (MSDS) for Alroc states that Alroc has a tested pH of 11.2 to 11.5 (Exh. C-6). OSHA’s analysis of bulk samples of Alroc taken at the site show a pH of 11.5 (Exh. C-8). The MSDS includes the following items in the section titled “Health Hazards” (Exh. C-6):

Acute--Avoid skin and eye contact. This product is alkaline and may produce skin and eye irritation. If dust exposure is kept below the TLV’s for nuisance dust, fluoride should not represent a health hazard.

Chronic--Overexposure to fluoride may cause increased bone density. Dermatitis may occur from prolonged skin contact.

Signs and Symptoms of Exposure--Eye, skin or respiratory tract irritation.

Medical Conditions Generally Aggravated by Exposure--Pre-existing upper respiratory and lung diseases such as, but not limited to, bronchitis, emphysema, and asthma.

The MSDS warns employees working with Alroc to wear goggles and a face shield “as appropriate” and to wear rubber or cloth gloves “as necessary.”

The Secretary has established that Alroc is properly classified as a hazardous chemical. The MSDS states that exposure to Alroc can irritate the eyes, skin, or respiratory tract. The definition of “health hazard” encompasses such irritants. Section 1910.1200(h)(3)(iii) applies to the Alroc at the worksite.

Noncompliance with the Standard

JTM claims that it provided training to its employees on working with Alroc. John Reeder, JTM’s plant manager for its Gum Springs site, testified that he had trained JTM employees in March 1996. He stated that he provided each employee with a copy of the MSDS for Alroc and that he read

each section of the MSDS to the employees. The meeting lasted for one hour, thirty minutes of which was spent going over the MSDS on Alroc. The employees signed attendance sheets at the meeting (Exh. R-4; Tr. 360-363).

William Lyle Smith, a JTM employee, attended the meeting held by Reeder. He stated that Reeder's training on Alroc consisted of telling the employees "not to handle it or, you know, not to come into direct contact with it" (Tr. 131). When asked if JTM had any emergency procedures in place for exposure to Alroc, Smith replied, "I don't guess so" (Tr. 131). JTM did not provide training on the proper personal protective equipment to wear when working with Alroc (Tr. 140-141).

JTM's training is inadequate for purposes of the standard. Section 1910.1200(h)(3)(iii) requires the employer to train employees in specific measures the employer has taken to protect the employees, such as emergency procedures and personal protective equipment to be used. JTM failed to provide its employees with any training beyond telling them to avoid direct contact with the Alroc. It was not possible to follow these instructions at the E-40 site. The Alroc dust was constantly swirling all around the employees, caking their skin and getting in their hair and clothes. JTM failed to explain to its employees measures they could take to protect themselves from the health hazards presented by the Alroc. JTM did not comply with § 1910.1200(h)(3)(iii)

Employee Exposure

JTM employees were working at the E-40 site on July 18, 1997. Smith stated that driving on an Alroc road and raising dust was a daily occurrence (Tr. 151). Smith testified that he had helped tear up the Alroc roads during that summer (Tr. 149). JTM manager Reed testified that he was exposed to Alroc dust every day (Tr. 358).

The Secretary has established that JTM's employees were exposed to Alroc during the period stated in the citation.

Employer Knowledge

JTM was aware that Alroc is a hazardous chemical and that JTM was not providing the required training. The company had the information from the MSDS identifying Alroc as a skin, eye, and lung irritant. Reed, a management employee, was in charge of the hazardous substance training. The training he gave was inadequate. As a supervisory employee, Reed's knowledge of the inadequacy of the training is imputed to JTM.

The Secretary has established that JTM committed a violation of the cited standard.

The hazard created by JTM's failure to provide adequate training to its employees is that they would fail to use proper personal protective equipment when working with Alroc, possibly resulting in irritations of their eyes, skin, or lungs. The violation is classified as serious.

Item 2: Alleged Serious Violation of § 1910.132(a)

The Secretary alleges that JTM committed a serious violation of § 1910.132(a), which provides:

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

Applicability of the Standard

JTM argues that the Secretary failed to prove the existence of a hazard to employees of sufficient severity to warrant the use of PPE. JTM contends that Alroc contains mild irritants not capable of causing substantial injury or impairment to employees. "The broad personal protective equipment standard at section 1910.132(a) applies to the facts of the case if a reasonable person familiar with the circumstances, including facts unique to an industry, would recognize a hazardous condition requiring the use of personal protective equipment." *Lukens Steel Company*, 10 BNA OSHC 1115, 1123 (No. 76-1053, 1981).

JTM's employees experienced symptoms associated with exposure to a highly alkaline material such as Alroc. Employees working at the site complained that the Alroc irritated their skin, especially when they were sweating (Tr. 127). Employees experienced severe headaches while working with Alroc (Tr. 22, 84, 116).

JTM employees Jim Boulder and Rickie Nutt testified that they did not develop rashes or have any other adverse reactions to working with Alroc (Tr. 457, 470). JTM argues that the absence of reaction to Alroc in these employees, as well as the failure on the Secretary's part to prove a causal connection between Alroc and the other employees' rashes and headaches, results in a failure of proof for the existence of a hazard that would require the use of PPE.

The fact that not all employees developed rashes or headaches does not negate the existence of a hazard. People have differing sensitivities to environmental irritants. The fact that one employee may have a higher tolerance for a hazardous substance than another employee does not render the substance any less hazardous.

The dispositive evidence on this issue is the MSDS for Alroc. It details the signs and symptoms of exposure, and lists the medical conditions aggravated by exposure. The MSDS recommends the use of PPE when working with Alroc. A reasonable person familiar with the MSDS who knew that his employees were working daily with Alroc, to the extent that they were regularly coated with dust from the Alroc, would have required the use of PPE. Section 1910.132(a) applies to the cited conditions.

JTM also argues that (JTM's brief, pp. 42-43):

the subject of eye protection is covered by a more specific standard which was not cited. The standard, 29 CFR § 1910.133, specifically addresses the need for eye protection and because it is more specific, it preempts §1910.132(a) and renders § 1910.132(a) inapplicable to eye protection. It should be noted that § 1910.133(a) requires eye protection to protect against the hazards of flying particles, molten metal, liquid chemicals, acids, or caustic liquids, chemical gases or vapors, or potentially injurious light radiation. Mere dust particles, alkaline or not, do not require eye protection. Therefore, the use of eye protection is not properly an issue.

JTM is correct in its recitation of the hazards that § 1910.133(a) was designed to protect against. "Mere dust particles" are not included among those hazards. The cited § 1910.132(a), however, requires the use of personal protective equipment (PPE) for eyes "wherever it is necessary by reason of hazards of processes or environment, [and] chemical hazards[.]" Therefore, § 1910.132(a) addresses the hazard of exposing of the employees' eyes to the hazardous chemical Alroc more specifically than does § 1910.133(a). Section 1910.133(a) does not preempt § 1910.132(a), and the use of eye protection is properly an issue in this case.

Noncompliance with the Standard

Compliance officer William Cole testified that the PPE needed to protect employees from the hazards of Alroc were "Tyvek suits for your skin exposure; protective gloves that prevent the material from being on the hands; boots and eye protection, such as goggles or some kind of perhaps safety glasses with a face shield to keep the dust off of the face and eye area" (Tr. 203).

William Smith wore safety glasses, ear plugs, and steel-toed boots. He wore short-sleeved shirts. He stated that the other JTM employees wore the same thing (Tr. 132).

The record establishes that JTM did not require its employees to wear appropriate PPE when working with Alroc. Its employees wore short sleeved shirts that exposed their arms to contact with the Alroc dust. They wore safety glasses but not goggles or face shields. JTM was in noncompliance with § 1910.132(a).

Employee Exposure

JTM's employees were exposed to Alroc on a daily basis (Tr. 151, 172, 177).

Employer Knowledge

JTM was aware that it did not require its employees to wear any PPE other than safety glasses.

The Secretary has established a violation of § 1910.132(a). The hazard created by failure to comply with the standard is that employees experienced exposure to the chemical irritants in Alroc. The violation is classified as serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

The record does not establish the size of JTM's business. No evidence or prior violations or of bad faith was adduced. The gravity of the violations is low. The exposure was nearly constant while five JTM employees were at the site, but the harmful effects of the Alroc to which they were exposed were mild. It is determined that the appropriate penalty for item 1 and item 2 is \$600.00 each.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

